IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 972.

PERRY HARTMAN CANADAY and C. B. RICHARDSON,
Citizens of the U. S. A., and Residents of
the State of Tennessee,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY FOR RESPONDENT IN OPPOSITION.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street, CHestnut 1-3111

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 972.

PERRY HARTMAN CANADAY and C. B. RICHARDSON,
Citizens of the U. S. A., and Residents of
the State of Tennessee,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY FOR RESPONDENT IN OPPOSITION.

MAY IT PLEASE THE COURT:

The petitioners pray that a writ of certiorari issue to review an opinion and judgment of the Supreme Court of Tennessee dated February 6, 1958.

OPINION BELOW.

The order overruling the motion for a new trial and judgment of the trial court (Tr. 49-50) is unreported. The opinion of the Supreme Court of Tennessee affirming this

conviction is reported unofficially in 319 S. W. 2d 428, and will be reported in (. . . . .) Tenn. (. . . . .) (Appendix D to Petition).

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the Fourteenth Amendment to the Federal Constitution.

QUESTION PRESENTED.

Whether or not the Honorable Trial Judge's refusal to grant the petitioners' motion for a change of venue and their motion for a mistrial constitutes such a denial of due process as to afford this Honorable Court jurisdiction to review their conviction, in the absence of any evidence to support the allegations contained in said motion to the effect that the jurors were biased and prejudiced because of unfavorable newspaper reports and headlines against the defendants and the local unit (Teamster's Local No. 327) to which they belonged.

STATEMENT.

The jury in this cause was selected from a total of 700 prospective veniremen (Tech. R. 21-33). This jury found the petitioners guilty of conspiracy to commit an assault and battery and imposed a fine of $1,000.00 on each of them (Tech. R. 42). The Trial Judge overruled the motion for a new trial in petitioners' behalf and imposed an additional sentence of eleven months and twenty-nine days in the workhouse of Davidson County, Tennessee, upon each petitioner (Tech. R. 49-50).

None of the testimony in this Record has been certified to this Honorable Court. Therefore, it is impossible for counsel representing the Respondent to make a statement of

the facts in this case without get ing outside the part of the Record certified.

To support the motion for a change of venue and the motion for a mistrial, counsel for the petitioners in said motion directed the attention of the Honorable Trial Judge to the number of prospective jurors subject to challenge for cause upon their open admission of bias and prejudice resulting from newspaper articles. The Court inquired if counsel for the petitioners desired to produce testimony in support of their motion and the said counsel declined to offer any testimony to that effect. The Honorable Trial Judge then overruled counsel's motion (Tech. R. 36-37).

The portion of the certified record does not indicate the number of prospective jurors challenged for the cause stated above or for other causes, nor can it be determined from the certified portion of the record whether or not there was any basis for said motion. Since no other portion of the record was requested to be certified, it must be assumed that there was nothing contained therein to support petitioners' motions.

ARGUMENT.

Counsel for the petitioners cite and rely upon the case of **Shepherd v. Florida**, 341 U. S. 50, 95 L. ed., 71 Sup. Ct. In that case, **Shepherd v. Florida**, supra, the facts showed that witnesses and persons called as jurors said that they had read or heard of the Sheriff's statements in the county where the case was tried to the effect that the defendants had confessed to the commission of the offense as well as other inflammatory information, and no effort was made to introduce the confession at the time of the trial. Such was not true in the instant case, or at least it is not disclosed by the record. There is nothing in the certified portion of the record to indicate that any witnesses or prospective jurors on voir dire testified in support of said motions, nor was any effort made to submit proof of the facts alleged or stated in their motions even after the Honorable Trial Judge asked if counsel desired to submit proof. Certainly it cannot be said that the allegations made in the motions were evidence within themselves.

Evers v. Hollman, 196 Tenn. 364, 268 S. W. 2d 97, 99:

> "This is because a motion is nothing more than a pleading, and a pleading, nothing else appearing, is not evidence."

Overton v. State, 165 Tenn. 575, 579, 56 S. W. 2d 740, 742:

> "The motion for a new trial represents that certain requests were offered, but as we have often pointed out, the motion for a new trial is nothing but a pleading and cannot be looked to as establishing facts that it alleges."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

.....

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

.....

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I have mailed a copy of this Reply for Respondent in Opposition to the Hon. H. G. B. King, 723 Chattanooga Bank Building, Chattanooga, Tennessee, and to the Hon. C. Allen High, 301 Stahlman Building, Nashville, Tennessee, on the ... day of May, 1958.

.....

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.